STATE OF MICHIGAN

COURT OF APPEALS

THOMAS L. SHIVELY,

Plaintiff-Appellant,

v

BATTLE CREEK PUBLIC SCHOOLS,

Defendant-Appellee

and

BATTLE CREEK BOARD OF EDUCATION,

Defendant.

UNPUBLISHED
February 1, 2005

No. 249716
Calhoun Circuit Court
LC No. 02-002085-NZ

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment granting defendant's motion for summary disposition. We affirm.

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition regarding his breach of contract claim. A trial court's decision on a motion for summary disposition is reviewed de novo. Dressel v Ameribank, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing de novo a decision on a motion for summary disposition based on the lack of a material factual dispute, an appellate court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the light most favorable to the party opposing the motion. MCR 2.116(C)(10), (G)(5); Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is properly granted if there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. Id. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v Gen Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003) (citations omitted).

In this case, plaintiff had a written contract with defendant for employment for a definite term of two years; the terms of the contract limited the way in which defendant could terminate plaintiff's employment or alter his assignment. Specifically, defendant could terminate

plaintiff's employment only for cause or, with six months' notice, for financial reasons. However, defendant was excused from providing plaintiff six months' notice in the event of a financial emergency.

Plaintiff initially asserts that the trial court improperly granted defendant's motion for summary disposition regarding his breach of contract claim because the trial court found that plaintiff had failed to show "causation," which is not an element of a breach of contract claim. We find plaintiff's statement of the trial court's reasoning incomplete. When plaintiff's counsel specifically asked the trial court for its ruling concerning plaintiff's breach of contract claim, the trial court responded:

> THE COURT: The same. I really don't think there was any kind of causal connection, ma'am in the action taken by the board. I acknowledge there was a salary differential. I acknowledge that by virtue of adopting a budget that they did it cut [sic] short the length of time he would have been in the position, but I really do believe that what the board did was justified based upon the reports being made by the finance committee, the PAC committee to the board. That's the reason for the Court's ruling, ma'am. [Emphasis added.]

Although the trial court references a "causal connection" in its answer, a complete reading of its response demonstrates its finding that defendant was justified in eliminating plaintiff's position without six months notice because of the financial concerns identified by defendant's committees.

Plaintiff's main argument is that the determination of the existence of a financial emergency is a question of fact for the jury, while defendant argues that its board is "given considerable discretion by law for determining sufficient economic reasons for terminating the contract." According to case law, bona fide economic reasons are just cause for discharge. McDonald v Stroh Brewery Co, 191 Mich App 601, 609; 478 NW2d 669 (1991). When the evidence contains a material dispute over the genuineness of the economic necessity, the question of just cause is one for the trier of fact. Ewers v Stroh Brewery Corp, 178 Mich App 371; 378-379; 443 NW2d 504 (1989). Plaintiff argues that defendant, specifically Connie Duncan, concocted the financial emergency in order to justify the elimination of plaintiff's position. In support of his argument, plaintiff notes inconsistencies between documents showing the Center's budget projections and the Center's actual revenue, David Disler's testimony that the Center's financial status had remained basically the same since its opening, and the fact that, under the adopted budget that eliminated plaintiff's position, defendant not only granted a retroactive pay increase to administrators but also created a new administrator position.

We conclude, as did the trial court, that there was no genuine issue of material fact on whether defendant validly terminated plaintiff's contract because of a financial emergency. The undisputed evidence reveals that the decision to eliminate plaintiff's position was made by defendant's Battle Creek Area Mathematics and Science Center's Policy Advisory Committee (PAC) on June 17, 2002. That decision was in turn based on the earlier recommendation from the finance subcommittee, which concluded that, under the worst-case scenario, the Center would be running a deficit in the 2002-2003 school year. Thus, the subcommittee requested several cost-cutting proposals from Duncan for the next meeting, which were to include

consideration of eliminating plaintiff's position, the second highest administrative position at the Center.[1]

Duncan complied with the subcommittee's request. Importantly, each member of the subcommittee provided uncontradicted testimony[2] that they believed the Center was in a financial emergency, and that any cuts should be as harmless toward student services as possible. Moreover, as plaintiff notes in his brief on appeal, Disler testified that since its inception, the Center had experienced financial difficulties. It was also undisputed that revenue sharing, state aid, and changed accounting practices raised significant financial problems that needed to be addressed by the subcommittee and ultimately the PAC.

Plaintiff's evidence did not raise a genuine issue of material fact, as it simply showed that Duncan's initial projections turned out not to be entirely accurate. However, that evidence does not account for the modifications to her projections made prior to the PAC's final decision, such as an increase projection for kit sales, and for accounting practices modified at the requests of the District's CPA. Additionally, none of this evidence impugns the actual decision made by PAC and financial subcommittee members who had no knowledge of any alleged animosity between plaintiff and Duncan. The trial court therefore did not err in granting defendant's motion for summary disposition.

Plaintiff next argues that the trial court erred in granting defendant's motion for summary disposition with respect to his Whistleblower's Protection Act (WPA) claim. We disagree. As noted above, a trial court's decision on a motion for summary disposition is reviewed de novo, Dressel supra at 561, as are questions of statutory interpretation and the trial court's determination regarding whether a plaintiff has established a prima facie case under the WPA, Manzo v Petrella, 261 Mich App 705, 711; 683 NW2d 699 (2004). "To establish a prima facie case under this statute, a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." West, supra at 183-184; see also Phinney v Perlmutter, 222 Mich App 513, 553; 564 NW2d 532 (1997). The trial court granted defendant's motion after concluding that plaintiff failed to show a causal connection between his report to defendant of possible safety violations in the workplace and the alterations of his job duties and subsequent elimination of his position.

While plaintiff argues that the causal connection requirement can be inferred from the timing between his report to defendant and the negative treatment directed toward him, Tyrna v Adamo, Inc, 159 Mich App 592, 601; 407 NW2d 47 (1987), this argument fails. While the elimination of plaintiff's position occurred after his report to defendant of a potential safety problem in the workplace, the alteration of his job duties began well before his report when he

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[1] Thus, contrary to plaintiff's arguments, Duncan did not come forward with the idea of eliminating plaintiff's position. Instead, the undisputed evidence is that the finance subcommittee, and in particular, Chris Wigent, came up with that as a possible solution.

[2] Plaintiff did not depose any members of the finance subcommittee.

volunteered to write grants, and his conflict with Duncan had already begun. Importantly, as previously noted, the elimination of plaintiff's position began months later through the suggestion of a member of defendant's financial subcommittee, not Duncan, who knew nothing of plaintiff's report. Although plaintiff argues that Duncan used the subcommittee's request for proposed budgets eliminating plaintiff's position as an opportunity to rid herself of plaintiff, plaintiff has failed to show evidence of such intent other than his own subjective belief and one teacher's comment that Duncan was in "damage control" after plaintiff's report. Therefore, plaintiff has simply failed to demonstrate that the adverse employment actions he suffered were connected with his report to defendant of a potential safety concern in the workplace. The trial court did not err in granting defendant's motion for summary disposition with respect to plaintiff's WPA claim.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio